

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
PETITION FOR
REHEARING
EN BANC**

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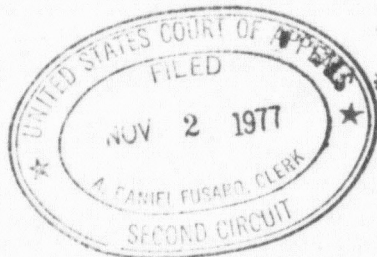
77-2036

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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EDWARD NEWFIELD,
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Appellant,
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-against-
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Docket No. 77-2036
:
UNITED STATES OF AMERICA,
:
:
Appellee.
:
:
-----X

PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK



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:
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:
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:
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ON APPEAL FROM AN ORDER
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is annexed hereto as Appendix A.

STATEMENT OF THE CASE

The conviction challenged by the §2255 application occurred following a five-day jury trial for bank robbery. Prior to trial, there was no motion submitted requesting a physical examination, and the record does not indicate whether appellant's behavior during trial was marked by bizarre or unusual behavior.* Rather, the first evidence concerning appellant's psychiatric history came to the attention of the court prior to sentencing in the form of two letters submitted with the presentence report.

One of the evaluations was by Edward Kaufman, M.D., in 1973 the chief psychiatrist of the Lower East Side Services Center. Dr. Kaufman's letter, dated October 17, 1973, was based on interviews with appellant over a period of years up to September 26, 1973; presentence reports; talks with appellant's family; and previous court appearances. The letter includes the following observations:**

*The minutes of the trial are not at present a part of the record. A motion to withdraw appellant's direct appeal from the judgment of conviction was granted by this Court on February 10, 1975, and therefore the trial minutes were never transcribed. The minutes were apparently not ordered by the court below in its analysis of appellant's petition.

**The letter was set forth as "F" to the appendix to the brief on appeal for appellant.

When seen on Sept. 26, Mr. Newfield was much the same as he had been in my previous contacts with him. His anxiety was as intense, if not more so, than in prior contacts. He was quite tremulous. His speech was extremely rambling, accusatorial and tangential and he would deviate from an initial point for up to ten minutes and would not return to the subject unless directly brought back to it by the interviewer. As he became more relaxed during the interview, his anxiety diminished as did his circumstantial speech. He was also quite depressed during the interview and cried freely, particularly when discussing the extent of his symptoms and his good feelings about being able to communicate with me again.

He presents numerous paranoid phenomena. Included in these is a detailed preoccupation with the Federal Government being particularly out to get and kill him. He is also preoccupied with paranoid fantasies, such as the glass blocks on the walls are two-way mirrors. This thought is more a fantasy than a delusion. He stated that he no longer heard the hissing sounds which he had heard previously. However, he is currently troubled by what is best termed a somatic delusion, i.e., the feeling that he is charged with electricity to a point where he is actually experiencing the voltage.

* * *

Edward Newfield was first diagnosed as schizophrenic at Buffalo State Hospital in 1954. The report of the Board of Examiners at Lewisburg in Feb. 1966 confirmed this diagnosis. His present anxiety, impairment of associative thought processes and paranoid thinking support a diagnosis of Chronic Undifferentiated Schizophrenia.

(Emphasis added.)

The second enclosure was a letter from Dr. Morris Herman, dated September 13, 1977.* Among the relevant facts adduced

*The Herman letter was set forth as "H" to the appendix to appellant's brief on appeal.

in this letter were the doctor's observation that appellant was previously committed to a mental hospital, that he was diagnosed as a schizophrenic individual in 1966, and that he had a long history of narcotics addiction. The letter concluded that appellant had "important personality defects," but that it was not clear that these defects reached the intensity to be considered as psychosis, although in 1966 he was designated schizophrenic.

The record indicates that both reports were in the possession of defense counsel prior to trial, as well as prior to sentencing. Following receipt of the presentence report, sentence was imposed without a request by counsel for psychiatric examination and without such an examination ever having been performed.

On January 24, 1976, by a "next friend" application, and by a subsequent motion filed on February 20, appellant moved to vacate the conviction, alleging that he was incompetent at the time of his trial and stating that there was irrefutable evidence that he was, at that time, suffering from schizophrenia, that he had been diagnosed as suffering from that condition as recently as September 26, 1973. Annexed to the second application was the 1973 letter of Dr. Kaufman as well as an earlier evaluation dated February 11, 1966,* a "Report of Psychiatric Board of Examiners," also authored by Dr. Kaufman. The report

*The report is reproduced as "G" to the appendix to appellant's brief on appeal.

was filed in reference to a §2255 motion in an entirely different case made by appellant challenging a plea of guilty entered some time prior to 1966. The report reveals a 20-year history of addiction by appellant, as well as a "paranoid manner;" the report diagnoses appellant as "schizophrenic reaction, chronic undifferentiated type," but "not sufficient to warrant a diagnosis of paranoid schizophrenia," with a notation that prognosis was "fair to poor."

On March 10, 1976, without any elaboration from the Government, the court denied appellant's application, summarily concluding that the files and records of the case conclusively showed that petitioner was entitled to no relief.

On appeal to this Court, appellant argued that the trial court had erred by failing to order a competency examination under 18 U.S.C. §4244 and that the same judge erred by refusing to hold a hearing on the §2255 application. The panel rejected both claims. With respect to the §4244 claim, the court emphasized that while the psychiatric reports were in the possession of trial counsel, "counsel made no suggestion that competence was a factor in the case." Appendix A at 104. The court also noted that the reports were intended to aid in sentencing, not in the determination of competency, and that appellant's competence "was apparently assumed by both examiners and counsel." Id. Noting the lack of evidence of bizarre behavior at trial, the panel found no "reasonable cause" before the district court requiring a competency examination. With

respect to the §2255 claim, the panel held that since the 1973 Kaufman letter had been long in the possession of trial counsel and the court, and where there was no assertion of "new information," there was no abuse of discretion in denying the claim without a hearing.

REASONS FOR GRANTING REHEARING

Appellant requests rehearing because the effect of the panel decision, particularly when read with previous cases decided by this Court, is to engraft in competency cases brought under 28 U.S.C. §2255 concepts of waiver utterly inappropriate for such cases.

Essential to the panel's conclusion that there was no "reasonable cause to believe that the accused may be incompetent," thus entitling appellant to a competency examination, was the fact that appellant's trial attorney failed to move for a hearing. Thus, the court noted both that the evaluations were concerned with sentencing and that competence was assumed by counsel, and that "counsel made no suggestion that competence was a factor in the case." Had counsel made such a suggestion, it is clear from previous opinions of this Court that the trial judge would have been required to order an examination. See United States v. Polisi, 514 F.2d 977 (2d Cir. 1975).

Thus, in Polisi, as here, counsel had failed to move for a §4244 examination prior to sentencing, and there was no evidence of bizarre behavior at trial. There, as here, the first

evidence of mental instability was presented with the presentence report which indicated that the defendant had a "service-connected disability for chronic brain syndrome" associated with a psychotic reaction. Thereafter, a study in aid of sentencing, not competency, was ordered; the study concluded by diagnosing Polisi, just as appellant was diagnosed by Dr. Kaufman, as a "chronic undifferentiated schizophrenic." 514 F.2d at 978-979. In Polisi, however, unlike the instant case, counsel at sentencing moved for a competency examination, turning the court's attention to the issue, and supported his motion by reference to the presentence report and the §4208 study. This Court held it error to have refused a §4244 examination. It appears, in sum, that the only relevant distinction between the two cases was counsel's focusing the court's attention in Polisi on the competency question and requesting the examination.

In this case, the "focusing" and request did not occur until appellant's motion under 28 U.S.C. §2255. While the panel found that there was no "new" information requiring a hearing under 28 U.S.C. §2255, that conclusion does not, we respectfully submit, address the argument advanced by appellant. If the trial court was not obliged sua sponte to direct an examination because its attention was not turned toward the problem, the motion and allegations by appellant supported by documentary evidence which would have entitled him to a hearing had his lawyer properly raised the issue should suffice to

require a hearing in a subsequent §2255 proceeding. Any other conclusion is, in effect, a finding of waiver by appellant of his claim because of his lawyer's failure properly to raise it.

A reading of the result of this case together with Polisi indicates that the court is saying that counsel's failure to move for a §4244 examination with the materials in his possession did not require a hearing to be granted since the district judge's attention was not directed to the competency problem; yet, for purposes of a §2255 hearing, a request for such a hearing with such evidence is insufficient to require a hearing because the evidence is not "new." Irrespective of whether this analysis might be appropriate for some types of cases, it is not in cases raising a competency issue. The result of the court's opinion is to make the failure of trial counsel to assert the issue a waiver of the issue, precluding its assertion on collateral attack. That result is not only inconsistent with the admonition of Pate v. Robinson, 383 U.S. 374, 384 (1966), that it is "contradictory to argue that a defendant may be incompetent, yet knowingly and intelligently to waive his right to have the court determine his capacity to stand trial," it is inconsistent as well with the panel's quotation of the above passage in this very case. Since the result of the panel's contradictory to its very language, rehearing should be granted.

CONCLUSION

For the foregoing reasons, the petition for rehearing should be granted.

Respectfully submitted,

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Of Counsel.

November 2, 1977

Appeal from orders entered in the United States District Court for the Western District of New York, Harold P. Burke, *Judge*, denying, without a hearing, petitions to vacate a bank robbery conviction on grounds of mental incompetence to stand trial.

Affirmed.

DAVID J. GOTTLIEB, The Legal Aid Society, Federal Defender Services Unit, New York, New York (William J. Gallagher, Martin Erdmann, The Legal Aid Society, Federal

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 77—September Term, 1977.

(Argued August 29, 1977 Decided October 19, 1977.)

Docket No. 77-2036

EDWARD W. NEWFIELD,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Before :

LUMBARD, OAKES and MESKILL,

Circuit Judges.

Defender Services Unit, New York, New York, of counsel), *for Appellant*.

EUGENE WELCH, Assistant United States Attorney, Western District of New York, Rochester, New York (Richard J. Arcara, United States Attorney, Western District of New York, Rochester, New York, of counsel), *for Appellee*.

MESKILL, *Circuit Judge*:

This is an appeal from orders entered in the United States District Court for the Western District of New York, Harold P. Burke, *Judge*, denying without hearings appellant Edward W. Newfield's "next friend" and *pro se* motions made pursuant to 28 U.S.C. § 2255¹ to vacate his bank robbery conviction on the ground that he was mentally incompetent to stand trial. Appellant Newfield also contends that the district court erred in failing to order *sua*

1 28 U.S.C. § 2255 provides, in pertinent part, as follows:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. . . .

.....
An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

sponte, as provided for in 18 U.S.C. § 4244,² a psychiatric examination at the time of trial.

We affirm.

Edward W. Newfield was indicted on June 16, 1972, for the December 1, 1971, robbery of \$9,606.00 from the Security Trust Company of Rochester, New York. After a five-day jury trial, on May 28, 1974, he was convicted of violating 18 U.S.C. § 2113(a). On June 8, 1974, Newfield was sentenced to five years imprisonment, the sentence to run concurrently with a sentence for bank robbery which Newfield was serving after his parole had been revoked. Prior to sentencing, two psychiatric evaluations were submitted to the trial court. One of the evaluations, by Edward Kaufman, M.D., and dated October 17, 1973, reported that Newfield's "present anxiety, impairment of associative thought processes and paranoid thinking support a diagnosis of chronic undifferentiated schizophrenia." He also

² 18 U.S.C. § 4244 provides, in pertinent part, as follows:

Whenever after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. For the purpose of the examination the court may order the accused committed for such reasonable period as the court may determine to a suitable hospital or other facility to be designated by the court. If the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing, upon due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto.

characterized Newfield as suffering from "severe mental illness." The other evaluation, by Morris Herman, M.D., and dated September 13, 1973, reported that Newfield had "important personality deficits" but it was "not clear that these deficits reached the intensity to be considered a psychosis." He concluded: "I cannot find sufficient symptoms at this time to diagnose schizophrenia but I can say that his personality and character structure are that [sic] of a schizoid person." Both evaluations were addressed to, and submitted by, Newfield's attorney.

On January 14, 1976, a "next friend" § 2255 motion was filed on Newfield's behalf alleging that Newfield was incompetent at the time of trial and that the bank robbery conviction and sentence should be set aside and vacated. Judge Burke denied the motion without a hearing on the ground that "the files and records of the case conclusively show that the petitioner is entitled to no relief." Nine days after this denial, Newfield filed a *pro se* § 2255 motion, again alleging legal incompetence at the time of trial and asking that the judgment and sentence be set aside and vacated. This motion was accompanied by Dr. Kaufman's 1973 evaluation as well as an evaluation authored by Dr. Kaufman in 1966 entitled "Report of Psychiatric Board of Examiners." The 1966 report was prepared by three professionals to support a § 2255 motion on Newfield's behalf to vacate a guilty plea to a prior bank robbery. This report stated that Newfield was a "relatively disturbed individual who made some attempt to appear sicker than he actually is by exaggeration of symptoms." The report also noted that Newfield had been addicted to heroin for 20 years, had a history of hospitalization and psychiatric care, exhibited some "anxiety and depression" and viewed the world in a "paranoid manner." The report diagnosed him as having "schizophrenic reaction, chronic undifferentiated type with some sociopathic trends," but

concluded that he was "competent at the time of his crime and at the time of his trial." Newfield's *pro se* motion did not include the evaluation submitted by Dr. Herman. This motion was also denied by Judge Burke without a hearing, again on the ground that "the files and records of the case conclusively show that the petitioner is entitled to no relief." Newfield appeals both denials,³ claiming again that he was incompetent by reason of mental disorder to stand trial. He also claims that, given the facts available at trial, the district court erred in not ordering *sua sponte* an inquiry into his competency to stand trial as provided for in 18 U.S.C. § 4244.

I. *The § 424 Claim.*

Whenever a trial court has "reasonable cause" to believe that a defendant is "presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense," a psychiatric examination must be ordered. If the examination indicates that the accused may be insane or incompetent, a hearing must be ordered. 18 U.S.C. § 4244. This Court has held that:

No part of a criminal proceeding may be proceeded with against a defendant who is at the time "insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense"

United States v. Sullivan, 406 F.2d 180, 185 (2d Cir. 1969); see *United States v. Marshall*, 458 F.2d 446, 449 (2d Cir.

³ The government alleges that Newfield's *pro se* notice of appeal to this Court was untimely filed, and that this Court must therefore dismiss for lack of jurisdiction. The record is confused on this issue. In view of our disposition here, we do not remand for a clarification.

1972). The test under the statute is stated in *Dusky v. United States*, 362 U.S. 402 (1960):

[T]he "test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."

Whether "reasonable cause" exists under particular circumstances is a question left to the sound discretion of the district court. *United States v. Hall*, 523 F.2d 665, 667 (2d Cir. 1975); see *United States v. Fawcetas*, 500 F.2d 1210, 1212 (2d Cir.), cert. denied, 419 U.S. 1069 (1974); *United States v. Marshall*, supra, 458 F.2d at 450; *Zovluck v. United States*, 448 F.2d 339, 342 (2d Cir. 1971), cert. denied, 405 U.S. 1043 (1972). The court may consider a defendant's history of psychiatric treatment in making such a decision, but awareness of such a history does not automatically require a finding of incompetency. "It does not follow that because a person is mentally ill he is not competent to stand trial." *United States v. Adams*, 297 F.Supp. 596, 597 (S.D.N.Y. 1969).

Here, the psychiatric evaluations by Dr. Kaufman and Dr. Herman were in the possession of Newfield's trial counsel well before the trial began, yet counsel made no suggestion that competence was a factor in the case. Even had the evaluations been made available to the trial court during the trial, their conclusions were inconsistent as to the severity of Newfield's psychiatric problems and were intended to aid not in the determination of Newfield's competence to stand trial but in the determination of an appropriate sentence in the event of a conviction. His competence to stand trial was apparently assumed by both the examiners and counsel. There is no indication in the record

that Newfield was unable to understand the proceedings against him or properly to assist in his defense. In addition, Judge Burke had five days of trial proceedings during which he observed Newfield's behavior, giving him ample opportunity to evaluate Newfield's competence. See *United States v. Hall*, *supra*, 523 F.2d at 668; *United States v. Vowteras*, *supra*, 500 F.2d at 1212; *United States v. Sullivan*, *supra*, 406 F.2d at 185; *United States v. Adams*, *supra*, 297 F.Supp. at 598.

There did not exist at trial evidence that Newfield was unable to understand the proceedings against him or properly to assist in his defense sufficient to require Judge Burke *sua sponte* to order a § 4244 examination or hearing into Newfield's competence. Similarly, there was no "flurry of warning flags" at the time of sentencing sufficient to alert Judge Burke to the need for a § 4244 inquiry into Newfield's competence. See *Saddler v. United States*, 531 F.2d 83, 87 (2d Cir. 1976). Accordingly, we affirm with regard to the § 4244 claim.

II. The § 2255 Claim.

Section 2255 provides a statutory remedy with which prisoners in federal custody may attack their sentence as being in violation of the Constitution or the various laws of the United States. Such a collateral challenge under § 2255 may result in the trial court setting aside, vacating or altering the sentence or granting a new trial. The statute provides in pertinent part as follows:

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make

findings of fact and conclusions of law with respect thereto.

Appellant Newell moved, pursuant to § 2255, to have his sentence vacated or altered, based upon the claim that he had been legally incompetent to stand trial. This motion is properly brought for the first time in a collateral proceeding, for it would be "contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." *Pate v. Robinson*, 383 U.S. 375, 384 (1966). However, the motion does not entitle petitioner automatically to a hearing. "[T]his court takes a dim view of any summary rejection of a petition for post conviction relief when supported by a 'sufficient affidavit.'" *Dalli v. United States*, 491 F.2d 758, 760 (2d Cir. 1974) (emphasis in original), quoting, *Taylor v. United States*, 487 F.2d 307, 308 (2d Cir. 1973). Apart from such circumstances, however, the matter is left to judicial discretion. See *Dalli v. United States*, *supra*; *Mirra v. United States*, 379 F.2d 782 (2d Cir.), cert. denied, 389 U.S. 1022 (1967); *Accardi v. United States*, 379 F.2d 312, 313 (2d Cir. 1967). "The language of [§ 2255] does not strip the district courts of all discretion to exercise their common sense." *Machibroda v. United States*, 368 U.S. 487, 495 (1962).

In *United States v. Miranda*, 437 F.2d 1255 (2d Cir. 1971), cert. denied, 409 U.S. 874 (1972), this Court considered the circumstances under which a district court would be required to hold an evidentiary hearing in response to a claim of mental incompetency raised pursuant to § 2255. We held that, "where no evidentiary facts are alleged to support a bald allegation of mental incompetence, a hearing may not be required. . . . On the other hand, where the movant has raised detailed and controverted issues of fact, a hearing will be required." 437 F.2d

at 1258 (citations omitted); see *O'Neill v. United States*, 486 F.2d 1034 (2d Cir. 1973); *United States v. Falu*, 421 F.2d 687 (2d Cir. 1969). Subsequently, in *Dalli v. United States*, *supra*, this Court noted that § 2255 requires a hearing unless the motion, files and records "conclusively show that the petitioner is entitled to no relief," but determined that the petitioner must be responsible for setting forth specific facts which he or she is in a position to establish by competent evidence. *Id.* at 760; see *Zovluck v. United States*, *supra*, 448 F.2d at 341. More recently, in *Wojtowicz v. United States*, 550 F.2d 786 (2d Cir. 1977), this Court reaffirmed the requirement of a hearing when a § 2255 motion presents "detailed and controverted issues of fact." *Id.* at 790. The Court also determined that "[t]he apparent regularity of the proceedings cannot 'conclusively show' that appellant's claim, which is based on facts outside the record, is without merit." *Id.*; see *United States v. Miranda*, *supra*, 437 F.2d at 1257-58; *United States v. Malcolm*, 432 F.2d 809, 813 (2d Cir. 1970).

While we affirm Judge Burke's conclusions that the "files and records of the case conclusively show that the petitioner is entitled to no relief," we urge the district courts to include in their orders denying § 2255 motions more than a conclusion which merely recites the wording of the statute. A memorandum setting forth the reasons for denying a § 2255 motion and not holding a hearing would aid this Court in its deliberations, and would inform petitioners more fully as to the nature of the disposition of their claims and assist them in determining whether, and on what grounds, to appeal the decision.

Nevertheless, where, as here, the § 2255 motion is supported solely by documents long in the possession of the appellant or the trial court, where there is no assertion

whatsoever of new information,⁴ let alone no setting forth of "detailed and controverted issues of fact," and where the trial court had ample opportunity to observe the appellant's demeanor and behavior in the courtroom, we cannot agree that the trial court abused its discretion by denying without a hearing two § 2255 motions based upon substantially the same claim. See *Sanders v. United States*, 373 U.S. 1 (1963); *Mirra v. United States*, *supra*, 379 F.2d at 787; *Yanni v. United States*, 420 F.Supp. 990, 992 (S.D. N.Y. 1976); *Palmieri v. United States*, 286 F.Supp. 520, 522 (S.D.N.Y. 1968). Given the rather sparse nature of appellant Newfield's assertions and supportive information, a § 2255 hearing is unwarranted.

Affirmed.

4 While it is true that the second petition by appellant Newfield pursuant to § 2255 included for the first time the evaluation written by Dr. Kaufman in 1966, we do not believe that such an evaluation, both out of date and equivocal, provides us with the required "detailed and controverted issues of fact"—particularly in light of the prior submission of the more recent evaluations authored by Dr. Kaufman and Dr. Herman.

